



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: D&G Contract Services

File: B-232879

Date: December 12, 1988

DIGEST

A contracting agency's determination to terminate the protester's contract as improperly awarded is reasonable where the protester's offer for a 1-year base period and 3 option years is materially unbalanced, since there is reasonable doubt that the offer--which has a substantially front-loaded base period price and does not become low until well into the last option year--would result in the lowest ultimate cost to the government.

DECISION

D&G Contract Services protests the termination of contract No. F49642-88-D0045, awarded to it by the Air Force, for the lease of washers, dryers, and ice machines for three Air Force installations in Maryland. The contracting officer decided to terminate the contract on the ground that D&G's offer was materially unbalanced, and D&G disputes that decision.

We deny the protest.

Offerors responding to request for proposals (RFP) F49642-88-RA282 were required to submit monthly and annual rental prices for the installation, relocation, and removal of estimated quantities of new ice machines and automatic washers and dryers, for a base year and 3 option years. These prices also were to include maintenance and repair costs. Offerors were advised that the contract would be awarded on the basis of the most advantageous offer considering price only, with base and option year prices being combined for evaluation purposes. The RFP also advised that the government might reject any offer if it was materially unbalanced as to basic and option quantities, defining "unbalanced" as "prices significantly less than

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cost for some work and . . . significantly overstated for other work."^{1/}

The Air Force evaluated all proposals and determined that D&G's offer was low in the aggregate over the potential 4-year period.^{2/} Laundramatics Limited, the third low offeror, and BALVA Financial Corporation, the second low offeror, filed protests with the contracting officer alleging D&G's prices to be materially unbalanced. Based on these protests and our decision in Crown Laundry and Dry Cleaners, Inc., B-208795.2, B-209311, Apr. 22, 1983, 83-1 CPD ¶ 438, the contracting officer determined that D&G's offer was materially unbalanced and therefore sustained the protests. The Air Force terminated the contract for the convenience of the government and resolicited the requirement. D&G then filed its protest with our Office.

D&G denies that its offer was unbalanced and therefore maintains that the termination of its contract was improper. D&G also disputes the applicability of unbalancing rules since this was a negotiated procurement and not sealed bidding.

Contrary to D&G's assessment of the applicable law, we have recognized that the concept of material unbalancing may apply in negotiated procurements where, as here, cost or price constitutes a primary basis for source selection. International Terminal Operating Co., Inc., B-229591, B-229591.2, Mar. 18, 1988, 88-1 CPD ¶ 287. There are two aspects to unbalanced offers and both must exist before rejection of an offer is proper. First, the offer must be mathematically unbalanced, that is, it must contain nominal prices for some work and enhanced prices for other work. Second, the offer must be materially unbalanced in the sense that there is reasonable doubt that award to the offeror submitting a mathematically unbalanced price will result in the lowest ultimate cost to the government. Id.; Semcor, Inc., B-227050, Aug. 20, 1987, 87-2 CPD ¶ 185.

^{1/} The presence of this provision refutes D&G's claim that no warning against unbalancing appeared in the RFP.

^{2/} In rounded terms, D&G's prices for the base year and 3 option years, respectively, were \$131,134; \$18,540; \$18,540; and \$18,523.

In determining whether an offer is mathematically unbalanced, an assessment must be made of whether the prices for base and option periods are accurate reflections of the actual costs that will be borne by the offeror in performing each year of the contract, taking into account any differences in the scope and nature of the services offered during those periods. See Fidelity Moving & Storage Co., B-222109.2, May 21, 1986, 86-1 CPD ¶ 476. In this regard, D&G asserts that its base year prices legitimately include the cost of acquiring the new equipment required by the contract; otherwise, if the agency does not exercise the options, the firm will be left with equipment for which it has no use "since agencies . . . require new equipment."

Although D&G has offered business reasons for its pricing structure, we decline to look behind an offer to ascertain the business judgments that went into its preparation. Rather, we believe that it is proper to determine whether unbalancing exists by focusing on the pricing structure and the services to be rendered. Crown Laundry and Dry Cleaners, Inc., B-208795.2, B-209311, supra, 83-1 CPD ¶ 438 at 5. Moreover, although business reasons for front-loading offers to the extent demonstrated by D&G may well exist, we cannot ignore the fact that an offer such as D&G's enables it to use, during a base contract period, government funds more properly allocable to option periods and creates the prospect of a windfall if all options for some reason are not exercised. Here, the scope and nature of the services are essentially the same for the base period and the option periods: rental and maintenance of washers, dryers, and ice machines. Further, while the mere percentage difference between base and option periods is not determinative, we observe that D&G's offer is extremely front-loaded: its base year price is approximately 700 percent of each of its option year prices. It is apparent from this disparity that D&G has provided an enhanced price for the base year and nominal prices for the option years. Such front-loading clearly warrants a finding of mathematical unbalancing.

With regard to material unbalancing, D&G contends that its low aggregate price for the base and option years, when divided by the total number of months in the contract, establishes that it has the lowest unit price. D&G also notes that the second and third option years have always been exercised for the washers and dryers contract and that it has been awarded contracts with a similar pricing structure at other Air Force installations.

A sufficient basis exists to consider an offer materially unbalanced where the offer's pricing structure prevents it from becoming low until the final contract year, thus reasonably suggesting that an award might not be in the government's best economic interest. See U.S.A. Pro Co., Inc., B-220976, Feb. 13, 1986, 86-1 CPD ¶ 159; Crown Laundry and Dry Cleaners, Inc., B-208795.2, B-209311, supra. Here D&G's pricing structure does not make it the low offeror until the 43rd month, well into the third option year. While D&G may have the lowest unit price when divided by the total potential contract period of 48 months, the fact remains that it did not offer a uniform unit price over the span of the base and option periods. Instead, D&G sought to recover 70 percent of the total contract price in the base year.

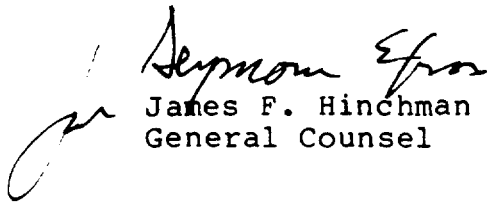
Further, despite any past practice of the Air Force in exercising all options, intervening events could cause the contract not to run its full term, resulting in an inordinately high cost to the government and a windfall to the offeror. Crown Laundry and Dry Cleaners, Inc., B-208795.2, B-209311, supra, 83-1 CPD ¶ 438 at 7. Moreover, to the extent the Air Force may have awarded contracts to D&G notwithstanding its use of a similar front-loaded pricing structure, improprieties in past procurements are not relevant to the propriety of the award in this case. See Barnes Electric Co., Inc., B-228651, Oct. 2, 1987, 87-2 CPD ¶ 331. Thus, we find that the Air Force was correct in its determination that D&G's offer was materially unbalanced.

The protester also argues that the agency should have resolved the issue of unbalancing during negotiations. While it would have been more appropriate to ensure the absence of unbalanced offers prior to award, an agency may properly terminate a contract in order to correct improprieties discovered after award. See generally United States Testing Co., Inc., B-205450, June 18, 1982, 82-1 CPD ¶ 604.

Finally, D&G contends that Laundramatics' protest to the agency was untimely and that therefore a termination of its contract as a result of such a protest would be improper. It appears from the record that Laundramatics' protest was timely filed. In any event, the untimeliness of a protest to the agency does not render improper a subsequent agency

determination to undertake corrective action. Amarillo Aircraft Sales & Services, Inc., 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269.

Accordingly, the protest is denied.


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General Counsel